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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1571

UNITED STATES OF AMERICA

Respondents

versus

SALVATORE SARULLO, and

GARY M. SOLOMON

Petitioners

BRIEF IN OPPOSITION TO THE MEMORANDUM FOR THE UNITED STATES ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Jurisdiction	1
Argument	2
Conclusion	7
Certificate of Service	8

TABLE OF AUTHORITIES

STATUTES

	Page
28 U.S.C. 1254 (1)	1

RULES

Rule 24 (4)	Rules of Supreme Court	2
Rule 24 (5)	Rules of Supreme Court	1

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This is a reply brief to the Memorandum of the United States filed August, 1975 in opposition to the Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit.

JURISDICTION

The petition for Writ of Certiorari was filed pursuant to 28 U.S.C. Section 1254 (1). A supplemental brief on behalf of the Petitioners was filed pursuant to Rule 24 (5) of the rules of the United States Supreme Court. This reply brief to the Memorandum of the United States is filed pur-

suant to Rule 24 (4) of the Rules of the United States Supreme Court in order to correct the governments dubious interpretation of the authorities and erroneous argument on the issue presented in the original petition.

ARGUMENT

The government did not address itself to the primary issue and that is, under what circumstances can the government introduce the same or similar evidence against the same defendants in subsequent prosecutions for an intricately related course of conduct? What does the doctrine of collateral estoppel prohibit the government from doing after a general verdict of acquittal? What does the constitutional double jeopardy provision mean in relation to multiple prosecutions of the same defendant?

The government admits in their Memorandum that some of the same evidence was used in both trials against the defendants when they stated:

> "The determination of the trial court and jury that the evidence in this context did not prove willfulness with regard to the Security Investors transactions therefore did not preclude a subsequent finding, **based upon some of the same evidence**, of willfulness with regard to the Solomon-Sarullo transactions." (pg. 8, emphasis added).

The government seems to reach this conclusion on the premise that "the truth or accuracy of these items of evidence was not at issue at the former trial". The accuracy of the financial records were never disputed. That is true. However, the government seems to ignore th fact that the petitioners by written and oral motion filed and argued

prior to trial attempted to persuade the trial judge to exclude all evidence and testimony introduced in the previous acquittal trial on the basis of collateral estoppel and the authorities extensively quoted in the Petition for Certiorari. This was denied.

The governments position merely echos the opinion of the Sixth Circuit Court of Appeals:

> "Criminal intent being a state of mind, may be determined only from the attendant facts and circumstances to which it bears a direct relationship. One may possess a criminal intent in one framework of facts, but, be perfectly innocent in another." (Pct. App. 28)

This reasoning smacks of obvious truth, but, it misses the whole point of due process double jeopardy. The record clearly reveals that the government proved the intent of the defendants in both trials by the same "attendant facts and circumstances", i.e., Solomon's statement to bank officers, Solomons handwritten notations attempting to reconcile the account, proof of payment to Solomon by Sarullo and Security Investors classified as bribes, Solomon's false credit letters, his knowledge of fraud detection and rolling entries, bank rules and regulations. The exact amount of money missing was also introduced in both trials and what portion was attributable to Sarullo and what part to Security Investors. In fact, the different transactions of Sarullo and Security Investors were so interdependent they could not be factually separated. Obviously, two juries disagreed as to what this evidence proved. The point is that both juries considered the same essential evidence.

The government attempts to bolster their argument by saying that at the first acquittal trial the "government introduced no evidence relating to the Solomon-Sarullo transactions." (pg. 5). This is a very misleading and a highly erroneous statement. The government did introduce at both trials all of the pertinent evidence pertaining to the issue of criminal intent, willfulness and criminal culpability in regard to misapplication of bank funds. Some of the specific financial transactions of Solomon-Sarullo and the total amount of money chargeable to the Solomon-Sarullo dealings were introduced by their co-defendants at the acquittal trial in an effort to separate themselves from Solomon-Sarullo. However, this should not be attributed to the petitioners to defeat their right to receive the protection of double jeopardy because the government forced them into this position. Sarullo filed and argued pre-trial motions for a severance of parties and Solomon filed pre-trial motions to consolidate the two indictments for purposes of one trial. The government contested both motions and they were denied by the trial court. To now claim that the government was not responsible for the introduction of such evidence is very unfair because to agree with this assumption would force the defendants in a conspiracy trial to refrain from exercising their constitutional rights to cross-examination and confrontation.

The government further attempts to support its argument by claiming that Sarullo's testimony on a pre-trial motion proves the existence of two separate conspiracies. This reasoning is very erroneous for three reasons:

First, assuming there were two distinct conspiracies in operation at the same time with the same two core figures, the record shows that both conspiracies were proven at both trials by the same evidence.

Secondly, this procedure places a defendant in an awkward, indefensible position To allow the government to use his testimony on a pre-trial motion in support of a constitutional privilege at any stage of a criminal prosecution has a chilling effect on the assertion of constitutional privilege and forces an accused to choose between his Fifth Amendment right to silence and other constitutional rights.

Thirdly, Sarullo claimed his Fifth Amendment privilege of silence at every trial and never testified before any jury. Thus, his testimony was never considered by any trier of fact.

The government also claimed in their Memorandum that Solomon and Sarullo were given a new trial on their first conviction because of newly discovered evidence. This is patently untrue and the misleading nature of this claim exemplifies the inherent dishonesty of the entire prosecution of the petitioners. A new trial was granted as a direct result of official suppression of evidence favorable to the accused by the government in the initial trial. In fact, the prosecutor admitted at the hearing on the motion for new trial that he had failed to disclose this evidence because he did not think it was important. Once the evidence was discovered by the petitioners attorneys in preparation for the trial which resulted in an acquittal, complete motions

for a new trial detailing all the facts were promptly filed with the trial court. These motions were entitled and their only thrust was willful and knowledgeable governmental suppression of evidence favorable to the accused at a trial which lasted eight days. The relevancy of said evidence and the fact that it was deliberately hidden, concealed and suppressed was shown the court and the court concluded that the first conviction was the result of fraud on the part of the government and granted a new trial. The statement about the first conviction and the reason for the new trial in the governments memorandum is merely a subtle, dishonest attempt to lead the court to believe that the petitioners had been convicted twice when the truth of the matter is that they were convicted the first time because the government willfully and maliciously defrauded a court and a jury. The petitioners had to bear the burden of this deceit. They had to run the same gauntlet two more times. They had to endure the agony of criminal prosecution three times and it was only as a result of the governments third and final attempt that they were finally convicted. This is precisely what double jeopardy is designed to prevent and this is the only reason the doctrine of collateral estoppel exists in our law.

CONCLUSION

Therefore, the Petitioners respectfully request that the Petition for a Writ of Certiorari to the United States Sixth Circuit Court of Appeals be granted for the reasons stated in the original petition as well as the authority in the Supplemental Brief and the reasons in the reply brief and that the conviction of the Petitioners be reversed and dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip E. Kuhn, being an attorney of record for the Petitioners, do hereby state that I have served three copies of this Reply Brief on the Solicitor General of the United States, The Honorable Robert Bork, by placing same in the U.S. mail, postage pre-paid, to his principle office in Washington, D.C. on the 22th day of September, 1975.

Phillip E. Kuhn